

## **Exhibit 4**

*State of California ex. rel. Ven-A-Care of the Florida Keys, Inc. v.  
Abbott Laboratories, Inc., et al.*

Exhibit to the Declaration of Nicholas N. Paul in Support of  
Plaintiffs' Opposition to Defendants' Joint Motion for Partial Summary Judgment

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

--oOo--

STATE OF CALIFORNIA, ex rel

VEN-A-CARE OF THE FLORIDA KEYS, INC.,

A Florida Corporation,

Plaintiffs,

vs.

MDL No. 1456

Master File No.

01-12257-PBS

ABBOTT LABORATORIES, INC.,

Civil Action No.

Et al.,

03-11226-PBS

Defendants.

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THURSDAY, NOVEMBER 6, 2008

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VIDEOTAPE DEPOSITION OF THE CALIFORNIA DEPARTMENT

OF HEALTH CARE SERVICES BY STANLEY L. ROSENSTEIN

--oOo--

Reported By: PATRICIA MCCARTHY, CSR No. 12888

Registered Professional Reporter

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1 worked to write size the program, we eliminated  
2 the 50 cents, we eliminated those other things  
3 and we sent, yeah, a different dispensing fee,  
4 and a different ingredient cost. So it is a  
5 fairly complicated transaction when you really  
6 get down to solving the issue.

7 Q. Okay. And I appreciate, there are a  
8 lot of, like dispensing fee, right, there are a  
9 lot of moving parts that have to be balanced.  
10 But I guess -- but what I am trying to get at is,  
11 did -- did DHS communicate in 1996 to the  
12 California Legislature an effort to reduce  
13 reimbursement rates that AWP minus 5 didn't  
14 reflect actual purchasing activity by California  
15 pharmacists?

16 MR. PAUL: Objection to form.

17 THE WITNESS: I am not sure in 1996  
18 where we did. We proposed additional  
19 reimbursement reductions in pharmacies, coming  
20 off of an AWP minus greater amount.

21 BY MR. BUEKER:

22 Q. And as a part of -- as a part of

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1 justifying that reduction, one of the things that  
2 DHS would have communicated to the California  
3 Legislature was that the AWP minus 5 didn't  
4 reflect actual purchasing activity by California  
5 pharmacists, correct?

6 A. Typically, my testimony when I did it  
7 was, that we were trying to get to honest  
8 pricing, that we accurately represented the cost  
9 of purchasing, and the cost of dispensing. The  
10 key was to have accurate pricing that had  
11 transparency, that everybody could see and agree  
12 to. So when I did the testimony on this, it  
13 really came from the perspective of we need to  
14 have a good honest price.

15 Q. Okay. And I am trying to -- I  
16 understand that. What I am trying to understand  
17 is, whether it was ever communicated to the  
18 California Legislature that AWP minus 5 didn't  
19 reflect the price at which pharmacists in  
20 California were actually purchasing  
21 pharmaceutical product?

22 MR. PAUL: Objection. Form.

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1 THE WITNESS: I believe the  
2 communication was that that was an excessive  
3 reimbursement, so that we could pay at a higher -  
4 - or lower price, higher AWP.

5 BY MR. BUEKER:

6 Q. Higher discount of AWP?

7 A. Higher discount and maintain access to  
8 care.

9 Q. Let us mark an audit report, California  
10 Medi-Cal program dated March 19, 1996 as  
11 Rosenstein 30(b)(6) Exhibit Number 6, please.

12 (Exhibit Rosenstein 006 Was Marked  
13 For Identification.)

14 BY MR. BUEKER:

15 Q. You can, Mr. Rosenstein, take whatever  
16 time you need to familiarize yourself with  
17 Exhibit 6, but I will tell you that I'm going to  
18 keep my questions fairly general.

19 A. You will focus on the pharmacy part of  
20 the audit?

21 Q. Well, no, I'm actually going to just --  
22 I have some process questions.

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1 price, which we have yet to be able to get to on  
2 these drugs. And that, you know, ought not to be  
3 this difficult to get to an accurate price.

4 MR. BANK: One second. I think I am  
5 done with the questioning.

6 MR. PAUL: Can I trade seats with you.

7 MR. BANK: Sure.

8 MR. PAUL: Please mark this as 38.

9 (Exhibit Rosenstein 038 Was Marked  
10 For Identification.)  
11

12 EXAMINATION

13 BY MR. PAUL:

14 Q. Mr. Rosenstein, I have marked as  
15 Rosenstein Exhibit 38 a document that reads --  
16 it's a West's version of California Welfare and  
17 Institutions Code, Section 14105.45, 2004 to  
18 2007.

19 I will represent to you that this is  
20 taken from the online West Law Database, printing  
21 out or reporting the statute. That statute, as I  
22 just read it, which was in effect from September

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1 2004, I believe, until August 2007.

2 MR. BUEKER: Objection as to form.

3 BY MR. PAUL:

4 Q. I would like to direct your attention  
5 to a couple of provisions of this statute. If  
6 you turn to the third page by the number 12 in  
7 brackets, if you follow along with me, "Selling  
8 price means the price used in the establishment  
9 of the estimated acquisition cost. The  
10 department shall base the selling price on the  
11 average sales price reported by manufacturers  
12 pursuant to subdivision C. Selling price shall  
13 not be considered confidential and shall be  
14 subject to disclosure under the California Public  
15 Records Act."

16 Did I read that correctly?

17 A. Yes.

18 Q. And below that in parens, capital  
19 letter A, this would be the second paragraph up  
20 in the bottom, "For single source and innovator  
21 multiple source drugs, the estimated acquisition  
22 cost shall be equal to the lowest of the average

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1 wholesale price minus 17 percent, the selling  
2 price, the federal upper limit, or the MAIC."

3 Did I read that correctly?

4 A. That's correct.

5 Q. And if you turn to the next page, third  
6 paragraph up from the bottom, enumerated  
7 paragraph small C1, "Manufacturers and principal  
8 labelers of legend and nonlegend drugs no later  
9 than 30 days after the end of each calendar  
10 quarter, and in a format determined by the  
11 department, provide to the department the average  
12 sales price of each of the manufacturer's legend  
13 and nonlegend drug."

14 Did I read that correctly?

15 MR. BUEKER: Objection as to form.

16 THE WITNESS: That's correct.

17 BY MR. PAUL:

18 Q. To your knowledge, did the department  
19 receive any cooperation from manufacturers with  
20 respect to the statutory provision I just read?

21 MR. BUEKER: Objection to form and  
22 beyond the scope.



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1 THE WITNESS: We did not. We sought to  
2 create an average sale price to address our  
3 concerns to get an accurate price for generic  
4 drugs that would be used in conjunction with  
5 other pricing and we were unable to get the  
6 information from the drug manufacturers to  
7 implement the statute.

8 BY MR. PAUL:

9 Q. And none of the four manufacturers who  
10 are represented by counsel at this table ever  
11 cooperated with that; is that correct?

12 A. We had, to my understanding,  
13 cooperation from no drug manufacturers in the  
14 implementation of this statute.

15 Q. Now, you know what, AWP stands for  
16 average wholesale price; is that correct?

17 A. That's correct.

18 Q. And to your knowledge, there is AWP in  
19 effect for each drug in the Medi-Cal program?

20 A. Yes, there is.

21 Q. And who determines what the value of  
22 AWP is?

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1 is First Data Bank get AWP information?

2 MR. BUEKER: Objection. Lack of  
3 foundation.

4 THE WITNESS: From the manufacturers'  
5 report at First Data Bank.

6 BY MR. PAUL:

7 Q. And does California have the means to  
8 police the accuracy of those AWPs?

9 MR. BUEKER: Objection. Lack of  
10 foundation and form.

11 THE WITNESS: We do not. It would take  
12 an enormous amount of staff and those change  
13 every month.

14 BY MR. PAUL:

15 Q. And to your knowledge, is it the intent  
16 of the Medi-Cal program that manufacturers report  
17 AWPs as an accurate measure of average wholesale  
18 prices?

19 MR. BUEKER: Objection. Form.

20 THE WITNESS: Absolutely. We depend  
21 upon the accuracy and the integrity of everybody  
22 who participates in the program. It is a

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1 humongous revised program with a relatively small  
2 staff.

3 In all aspects of it, it depends upon  
4 the people who provide the government, the state,  
5 the federal government with data they do  
6 accurately.

7 BY MR. PAUL:

8 Q. With regard to generic manufacturers,  
9 has any generic manufacturer, to your knowledge,  
10 ever come to the Medi-Cal program and provided  
11 information to explain to the program the  
12 difference between actual provider costs and its  
13 reported AWP's for any of its drugs?

14 A. Not in the 13 years that I have been a  
15 part of running the Medi-Cal program.

16 Q. So that statement would apply to the  
17 four defendants who are represented by counsel at  
18 this table?

19 A. That's right. No one has come to my  
20 office and told us that. And we have other  
21 providers who have come to us and disclosed, you  
22 know, inaccurate claiming over the past. It does

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1 happen, but none of the drug manufacturers have  
2 come to me and made that disclosure.

3 Q. I think you were showed earlier in the  
4 day an exhibit. I think it was Exhibit 5, a 1996  
5 report by the OIG concerning its examination of  
6 the discrepancy between AWP's and acquisition  
7 costs for generic and branded drugs.

8 Do you recall that?

9 A. Yes.

10 Q. To your knowledge, did any manufacturer  
11 come to the Medi-Cal program after the OIG issued  
12 that report to offer help in reforming its  
13 reporting of AWP's?

14 A. No.

15 Q. Did any manufacturer come to the  
16 program expressing any concern about the  
17 implications of that report to your knowledge?

18 A. Not to my knowledge, and never to me.

19 Q. If manufacturers AWP's had been reported  
20 by the manufacturers owning those AWP's as actual  
21 and accurate measures of their -- of the average  
22 wholesale prices of those drugs, would that have

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1 affected Medi-Cal's efforts to contain its drug  
2 reimbursement costs?

3 MR. BUEKER: Objection as to form.

4 THE WITNESS: Yes. We have been  
5 spending -- we spent all day talking about the  
6 effort we've had to get accurate pricing. Had we  
7 started with accurate pricing, we wouldn't have  
8 had to go through all of these changes, and we  
9 would have had an accurate reimbursement system  
10 in the Medi-Cal program. That would have saved  
11 the taxpayers hundreds of millions of dollars.

12 BY MR. PAUL:

13 Q. If manufacturers had reported their  
14 AWP's truthfully to the state, and by truthfully,  
15 I mean, as an accurate measure of actual average  
16 wholesale prices, would that have negated the  
17 need for a MAC program?

18 MR. BUEKER: Objection as to form.

19 THE WITNESS: Yes. We would pay, have  
20 the ability to pay pharmacies accurately. We  
21 wouldn't have to come up with a secondary method  
22 to get to honest data.

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1 BY MR. PAUL:

2 Q. So to your knowledge, no drug  
3 manufacturer, and in particular, no generic drug  
4 manufacturer made any effort to come to the  
5 California Legislature and explain that actual  
6 provider cost are value A and our AWP's are value  
7 B, and here is the difference between them?

8 A. I am not aware of it. Generally, we  
9 hear a lot of activity from the legislative  
10 staff, have contacts. I am not aware of anybody  
11 ever having that contact.

12 Q. Did you ever hear of any staffer or  
13 legislator in either the Senate or the Assembly  
14 state an acceptance of inflated AWP's or  
15 acceptance of reimbursement from the Medi-Cal  
16 program of pharmacy drugs based on inflated or  
17 untruthful AWP's?

18 MR. BUEKER: Objection as to form.

19 MR. CYR: Objection.

20 THE WITNESS: No, I do not. In fact, I  
21 have heard it quite the opposite of strong  
22 objection to the government getting false

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1 information.

2 BY MR. PAUL:

3 Q. In your years as chief deputy director  
4 for the Medi-Cal program and your 13 years as  
5 deputy director or chief deputy director and your  
6 30-some years experience with the Medi-Cal  
7 program in general, do you believe that drug  
8 manufacturers have an obligation to be truthful  
9 in all due respects when they report any kind of  
10 information to the Medi-Cal program on which the  
11 program relies for reimbursement?

12 MR. BUEKER: Objection as to form and  
13 beyond the scope.

14 THE WITNESS: Very much so. You know,  
15 it is an underlying law and assumption that  
16 people, when they interact with the government,  
17 are going to tell the truth and provide accurate  
18 information. The entire Medi-Cal program relies  
19 upon the honesty of people who participate in  
20 that program.

21 BY MR. PAUL:

22 Q. Has any representative of any generic

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1 drug manufacturer ever told you that they believe  
2 they do not have an obligation to be truthful in  
3 the information that they report to the program?

4 A. No.

5 Q. Or accurate?

6 A. Nobody has ever told me that. And had  
7 they, I would have taken very strong swift action  
8 in telling them that that was unacceptable. They  
9 did have the obligation, but nobody ever  
10 approached me and said that.

11 Q. Do you believe that the Medi-Cal  
12 program has been defrauded by manufacturers who  
13 have reported inflated AWP's knowingly to the  
14 program?

15 MR. BUEKER: Objection as to form.  
16 Calls for a legal conclusion.

17 BY MR. PAUL:

18 Q. Do you believe the program has been  
19 cheated?

20 MR. BUEKER: Objection as to form.

21 THE WITNESS: Yeah, I believe we have  
22 been. I believe the taxpayers have had to pay



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1 excessive amounts of money because of incorrectly  
2 reported and incorrectly reported AWP.

3 BY MR. PAUL:

4 Q. Earlier in your testimony in response  
5 to questions from counsel for Warrick, I think  
6 you mentioned at one point that Dr. Grossby  
7 conducted some interviews or participated in  
8 interviews with the participating pharmacies  
9 sometimes around 2004.

10 And I think you used the phrase, "This  
11 was a resource intensive effort on the part of  
12 Dr. Grossby and his pharmacists"; is that  
13 correct?

14 A. That's correct.

15 Q. And would you agree that had the  
16 generic drug manufacturers accurately reported  
17 their AWP as actual average wholesale prices  
18 that that resource intensive effort would not  
19 have had to take place?

20 MR. BUEKER: Objection as to form.

21 THE WITNESS: We would have saved  
22 hundreds of hours of our pharmacist's time that

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1 both that effort which took weeks and throughout  
2 this whole process, time that he could have  
3 better been spent on other ways to improve the  
4 Medi-Cal program.

5 BY MR. PAUL:

6 Q. Do you believe that if generic drug  
7 manufacturers had reported truthful average  
8 wholesale prices, by truthful, I mean, accurate  
9 measures of average wholesale prices to Medi-Cal  
10 that there wouldn't have been a need for the  
11 Myers & Stauffer studies?

12 MR. BUEKER: Objection as to form.

13 THE WITNESS: It would have been a  
14 necessary study, but it would have more focused  
15 on what was the appropriate cost of dispensing.  
16 We wouldn't have spent as much time on what the  
17 ingredient cost was, but we needed the study to  
18 understand what the appropriate cost of pharmacy  
19 dispensing was.

20 BY MR PAUL:

21 Q. Do you happen to have an understanding  
22 of the cost of the Myers & Stauffer cost study?

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1 MR. BUEKER: Objection as to form.

2 Beyond the scope.

3 THE WITNESS: I believe each study was  
4 in the neighborhood of 200- to \$250,000.

5 BY MR. PAUL:

6 Q. And those monies came from public fund,  
7 from the Medi-Cal program?

8 A. They came from the state and federal  
9 government.

10 Q. Just to be clear, I want to confirm  
11 with you whether or not, has it ever been the  
12 policy of the Medi-Cal program to deliberately  
13 accept inflated and inaccurate AWP's simply  
14 because the program knew it would offset them by  
15 shorting or minimizing the amount of the filling  
16 fee for pharmacists?

17 MR. BUEKER: Objection as to form.

18 MR. CYR: Objection.

19 THE WITNESS: No. It has always been  
20 our policy to have accurate information and to  
21 use that information to establish what the  
22 accurate price should be, should be on both ends

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1 of the equation. We do believe they need to be  
2 both looked at, but they have got to come from  
3 accurate data sources.

4 BY MR. PAUL:

5 Q. And are you aware, based on your  
6 experience, that actually under federal law, it  
7 is unlawful to offset ingredient cost payments  
8 with a filling fee?

9 MR. BUEKER: Objection as to form and  
10 lack of foundation. Calls for a legal  
11 conclusion.

12 MR. CYR: Objection.

13 THE WITNESS: No, I am not aware of  
14 that provision.

15 BY MR. PAUL:

16 Q. Based on your 13 years as deputy  
17 director and chief deputy director and your 30  
18 years in the program, can you state whether it  
19 was or was not ever the policy of the Medi-Cal  
20 program to deliberately accept the reporting by  
21 drug manufacturers of inflated AWP's simply  
22 because the program knew it would offset that